UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOSEPH STRYCHASZ *et al.*,	:	
Plaintiffs,	:	
	:	
-vs-	:	
	:	
MARON CONSTRUCTION COMPANY,	:	
INC. & RONALD DEFRANCESCO,	:	Civil No. 3:01cv2063 (PCD)
Defendants,	:	
	:	
-vs-	:	
	:	
UNITED STATES OF AMERICA,	:	
Third-Party Defendants.	:	

RULING ON THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

Third-party defendant United States of America ("Government") moves to dismiss the third party complaint against it pursuant to FED. R. CIV. P. 12(b)(1) and FED. R. CIV. P. 12(b)(6). In the alternative, the Government moves to sever or bifurcate the indemnification claim. For the reasons set forth herein, the motion to dismiss and the motion to sever or bifurcate are denied.

I. BACKGROUND

Plaintiff originally filed his complaint in the Connecticut Superior Court for the Judicial District of New London. Plaintiff alleged that defendant Maron Construction Company ("Maron") contracted with the Department of Transportation to renovate a gymnasium at the United States Coast Guard Academy. Midland Fire Protection Company ("Midland") was subcontracted by Maron to install a sprinkler system, which required that its workers access a concrete ventilation area. A number of covered openings were set in the ventilation area floor. The openings allegedly were once covered by

metal grates but were later replaced by roofing panels indistinguishable from the concrete ventilation structure. Plaintiff, an employee of Midland, stepped on a panel which gave way, causing him to fall twenty-seven feet onto a sidewalk. Plaintiff alleges that Maron and its superintendent, Ronald Defrancesco, were negligent for failing to inspect the construction site. Plaintiff's wife alleges loss of her husband's consortium. Defendants filed a third-party complaint against the Government seeking indemnification. The Government removed the case to this Court.

Defendants allege that the Government is the owner of the property at which plaintiff was injured. Defendant Maron was the Government's contractor. Defendants seek Government indemnification for any liability to plaintiffs. They allege that the Government was negligent in replacing the metal grates with less structurally sound panels that could not bear the weight of workers, failing to identify the location of the panels to contractors, failing to test or inspect the work area, failing to provide warnings to contractors on how to access and egress from the work area, failing to identify specific access or egress routes, failing to warn contractors that grates were replaced by panels, failing to inspect the work area to determine that the panels were inadequate to support the weight of workers, failing to advise contractors that the dangerous condition existed in latent form and failing to caution the contractors as to working on the area. The Government now moves to dismiss this complaint.

II. DISCUSSION

The Government moves to dismiss the third party complaint for lack of subject matter jurisdiction and for failure to state a claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

A. Standard

A motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All facts in the complaint are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

B. Analysis

The Government advances two arguments. First, it argues that this Court derives its jurisdiction on removal from the state court in which the complaint was originally filed. As the state court was without jurisdiction to hear the FTCA claim, this Court is without jurisdiction. Next, it argues that defendants fail to state a claim under the FTCA because a claim for indemnification will not lie absent a showing that the Government had exclusive control of the situation which resulted in injury, and such control has not been established.

1. Derivative Jurisdiction

Issues of derivative jurisdiction generally arise when a plaintiff files a state court claim over which federal courts have exclusive jurisdiction. It was long held that the federal court to which such a claim was removed would be without jurisdiction to hear the claim notwithstanding the fact that it would have jurisdiction had the complaint originally been filed in federal court because a removed complaint afforded a federal court no more than the jurisdiction of the state court. *See Minnesota v. United*

States, 305 U.S. 382, 389, 59 S. Ct. 292, 295, 83 L. Ed. 235 (1939); *see also Arizona v. Manypenny*, 451 U.S. 232, 243 n.17, 101 S. Ct. 1657, 68 L. Ed. 2d 58 (1981)("it is well settled that if the state court lacks jurisdiction over the subject matter or the parties, the federal court acquires none upon removal, even though the federal court would have had jurisdiction if the suit had originated there"). Derivative jurisdiction was eliminated to some extent by the enactment of 28 U.S.C. § 1441(e), which provides that "[t]he court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

Although defendants' state court claim for indemnification did not expressly invoke the FTCA, a tort claim against the Government will not lie absent an unequivocal waiver of sovereign immunity. *See United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). In its opposition brief, defendants concede that, although not expressly alleging so, their claim for indemnification is brought pursuant to the FTCA, which provides such a waiver, *see FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). Exclusive jurisdiction over FTCA claims vests in federal courts. *See* 28 U.S.C. § 1346(b); *Finley v. United States*, 490 U.S. 545, 547, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989). The state court was therefore without jurisdiction to hear the FTCA claim.

As the state court was without jurisdiction to hear the claim for indemnification, the Government, citing *Moreland v. Van Buren GMC*, 93 F. Supp. 2d 346 (E.D.N.Y. 1999), argues that this Court is without subject matter jurisdiction. Such is not the case. *Moreland* addressed the question of whether 28 U.S.C. § 1441(e), which eliminated derivative jurisdiction, applies with equal

force to cases removed exclusively pursuant to 28 U.S.C. § 1442. In its notice of removal, the Government refers to and quotes 28 U.S.C. § 1441(a). As the Government removed the present case pursuant to § 1441(a), § 1441(e) obviates the need to address the problem of derivative jurisdiction and the question addressed in *Moreland*.

2. FTCA Claim

The Government argues that defendant's third-party complaint fails to state a claim for indemnification under Connecticut law for failure to allege exclusive control over the situation in which plaintiff was injured, thus defendants failed to establish a requisite element of an FTCA claim. Defendants responds that the Government was obliged to warn them of any hidden dangers and that questions of exclusive control may not be resolved on the pleadings.

> A complaint states a cause of action under the FTCA when presenting a claim that is
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> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

FDIC, 510 U.S. at 477 (quoting 28 U.S.C. § 1346(b)(1)). The "law of the place" refers to the law of the state in which the accident occurred. *See Richards v. United States*, 369 U.S. 1, 10-15, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962). The present motion is limited to a determination of whether, under Connecticut law, a claim for indemnification would lie against a private person.

As alleged, the United States owns the property, defendants are contractor hired by the United States and plaintiff is an injured third party. Generally, one who employs an independent contractor

may not be held liable for the negligent acts of a contractor. *Douglass v. Peck & Lines Co.*, 89 Conn. 622, 627, 95 A. 22 (1915). This general rule is subject to a number of exceptions, such as where the owner retains control of the premises or supervises the contractor's work, or where the contractor's work is inherently dangerous, or where the owner has a nondelegable duty imposed by statute or regulation to take safety precautions. *See Ray v. Schneider*, 16 Conn. App. 660, 663-64, 548 A.2d 461 (1988). As such, a defendant seeking indemnification from a third-party defendant must establish: (1) that the third party was negligent; (2) that the third party's negligence was the direct, immediate cause of the accident and resulting injuries; (3) that the third party was in control of the situation to the exclusion of the defendant; and (4) that the defendant did not know of such negligence, had no reason to anticipate it, and could reasonably rely on the third party not to be negligent. *Kyrtatas v. Stop & Shop, Inc.*, 205 Conn. 694, 698, 535 A.2d 357 (1988).

The Government argues that defendants have not alleged exclusive control, thus have not established the third requirement of a claim for indemnification. Exclusive control is defined as "exclusive control over the dangerous condition that gives rise to the accident." *Skuzinski v. Bouchard Fuels, Inc.*, 240 Conn. 694, 706, 694 A.2d 788 (1997). In support of its position, the Government points to defendants' response in the answer to the original complaint alleging preparation of a safety plan as discrediting the allegations in their complaint. Such a reference to documents outside the complaint at issue is improper on a motion to dismiss. *See Merritt*, 245 F.3d at 186. The determination of exclusive control is typically a question of fact, *see id.* at 705, thus not properly resolved on a motion to dismiss.

The Government also argues that its motion to dismiss should be granted based on the limited

duty owed by a property owner to an independent contractor in notifying it of hidden dangers. A property owner is liable for injuries resulting from hidden danger of which a contractor was neither aware nor should have been aware. *Douglass*, 89 Conn. at 629. The Government points out that any of defendants' employees would have noticed the panels in the six months they worked in the area prior to the accident. Whether or not the failure to notice the presence of the panels is "incredulous," all facts are taken as true in ruling on the motion to dismiss. *See Manning*, 254 F.3d at 390 n.1. The motion to dismiss is denied.

IV. MOTION TO SEVER

The Government moves, as an alternative to dismissal, for severance or bifurcation of the third-party action pursuant to FED. R. CIV. P. 21 and FED. R. CIV. P. 42 arguing that the claim for indemnification is premature as defendants have not yet been found liable and that the original action is three-years older than the third party action, thus has progressed further in discovery. FED. R. CIV. P. 21 provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." FED. R. CIV. P. 42(b) permits bifurcation "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." *See Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.1984). The "application of Rule 42(b) involves primarily the consideration of convenience and fairness, [while] that of Rule 21 also presupposes basic conditions of separability in law and logic." *Spencer, White & Prentis, Inc. v. Pfizer, Inc.*, 498 F.2d 358, 362 (2d Cir. 1974). Considerations in granting such motions include: (1) whether the issues involved are significantly different, (2) whether the issues will be

tried before a jury or to the court, (3) whether the posture of discovery favors a single trial, (4) whether the evidentiary issues overlap; and (5) whether the party opposing the motion will be prejudiced. *Dallas v. Goldberg*, 143 F. Supp. 2d 312, 315 (S.D.N.Y. 2001); *German by German v. Federal Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995).

The present circumstances do not justify maintaining two separate proceedings. The claim for indemnification and the underlying negligence claim revolve around the same facts. Although the original parties proceeded in state court without the Government's involvement for three years, the present federal action was commenced with the Government and will proceed forward in this Court through the normal course of discovery, albeit with a slightly greater requirement for discovery on the part of the Government. Based on the similarity of the claims, it would be inefficient to stay proceedings on the third party complaint pending outcome of the original action, then to commence a separate action if defendants are found liable. Both matters may be simultaneously resolved without substantial prejudice to any party. The motion to bifurcate or sever is denied.

V. CONCLUSION

The Government's motion to dismiss (Docs. 29 & 34) is **denied**. The alternative motion to bifurcate or sever is denied.

SO ORDERED.

Dated at New Haven, Connecticut, July ___, 2002.

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Peter C. Dorsey
United States District Judge